(3)

Supreme Court, U.S.
FILED
JUN - 2 1994
OFFICE OF THE CLERK

No. 93-1766

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

U.S. ANCHOR MFG., INC.
Petitioner,

v.

RULE INDUSTRIES, INC.,
TIE DOWN, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR THE PETITIONER

R. HEWITT PATE
HUNTON & WILLIAMS
Riverfront Plaza,
East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200

WILLIAM F. YOUNG*
HUNTON & WILLIAMS
2000 Pennsylvania Avenue, N.W.
P.O. Box 19230
Washington, D.C. 20036 27602
(202) 955-1500

JAMES F. PONSOLDT
UNIVERSITY of GEORGIA
SCHOOL of LAW
Athens, Georgia 30602
(706) 542-5209

*Counsel of Record
June 2, 1994

9pp

TABLE OF CONTENTS

page

INTRODUCTION 1

ARGUMENT 2

I. THE ELEVENTH CIRCUIT APPLIED A 50% MARKET SHARE TEST AND IGNORED THE RULE THAT PRICE FIXING AGREEMENTS ARE *PER SE* ILLEGAL 2

II. THE RECORD CITATIONS RELIED ON BY TIE DOWN WERE NOT RELIED ON BY THE JURY OR THE ELEVENTH CIRCUIT 4

III. TIE DOWN'S PREDATORY PRICING AND RESALE PRICE MAINTENANCE CITATIONS ARE INAPPOSITE 5

CONCLUSION 6

TABLE OF AUTHORITIES

CASES

Brooke Group, Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. ___, 113 S.Ct. 2578 (1993) 5

Matsushita Elec. Ind. Co. v. *Zenith Radio*, 475 U.S. 574 (1986) 5

No. 93-1766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

U.S. ANCHOR MFG., INC.
Petitioner,

v.

RULE INDUSTRIES, INC.,
TIE DOWN, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

Perhaps if the Eleventh Circuit had written the opinion described in Tie Down's brief in opposition, there would be no problem warranting the Court's attention. The brief in opposition fails, however, to come to grips with what the court of appeals' opinion actually says, makes extensive citation to portions of the record that were never cited (much less relied upon) by the Eleventh Circuit, ignores that the jury found against the defendants, and relies heavily on irrelevant predatory pricing and resale price maintenance cases. As a result, the compelling reasons for review advanced in the petition remain unanswered.

ARGUMENT

I. THE ELEVENTH CIRCUIT APPLIED A 50% MARKET SHARE TEST AND IGNORED THE RULE THAT PRICE FIXING AGREEMENTS ARE *PER SE* ILLEGAL

Although it tries valiantly, Tie Down cannot blink the fact that the Eleventh Circuit's attempted monopolization analysis turns on a 50% market share test. As noted in U.S. Anchor's petition, the Eleventh Circuit's opinion briefly acknowledges the well-reasoned cases identifying the range of factors that should be examined other than market share. Pet. 12. But the court of appeals does not accord the slightest weight to the substance of those cases, or to the extensive evidence on the existence of important factors other than market share in this case.

Nowhere does Tie Down — or the Eleventh Circuit — deal with the fact that, as the properly instructed jury was entitled to find, in this duopoly market elimination of U.S. Anchor as a competitor would leave Rule with a commanding share of the relevant market. Instead, what the Eleventh Circuit said, and what its entire attempted monopolization analysis turns on, is this: "because Rule possessed less than 50% of the market at the time the alleged predation began and throughout the time when it was alleged to have continued, there was no dangerous probability of success in October 1985 *as a matter of law.*" Pet. App. 34a (emphasis supplied); *see also* Br. Opp. 6-7 (stating that "[t]he Eleventh Circuit held that there was no dangerous probability of success because Rule possessed less than 50% market share . . ."). [1] This is a bright line 50% market share test for

---

[1] Contrary to Tie Down's assertion that this 50% market share test merely conflicts with other decisions of the Eleventh Circuit, as shown in the petition the Eleventh Circuit's holding is in direct conflict with decisions in at least five other circuits, as well as noted academic authorities. Pet. 14-17.

attempted monopolization, and it is the *only* basis stated by the court of appeals for its decision.

Tie Down's effort to rewrite the Eleventh Circuit's conspiracy holding is equally unavailing. Tie Down claims this was not a "price fixing" case, only a "conspiracy to eliminate a competitor" case. Br. Opp. 10. But the only anticompetitive conduct ever at issue in this case was pricing conduct. *See* Pet. App. 88a-89a (trial court's holding, in denying Tie Down's motion for judgment notwithstanding the verdict, that there was sufficient evidence to support a finding of conspiracy and an agreement to form a conspiracy to engage in anticompetitive pricing). As the Eleventh Circuit said, the evidence was "sufficient to show an intent to achieve an unlawful objective on Rule's part, namely the use of predatory means to monopolize the fluke anchor market." Pet. App. 36a.

The predatory means employed by respondents was below cost pricing, so by definition the only Sherman Act Section 1 conspiracy ever at issue was a conspiracy to set prices. *See also* Pet. App. 11a (Eleventh Circuit's finding that "U.S. Anchor also alleged that Rule and Tie Down had conspired to restrain trade in violation of section 1 of the Sherman Act and conspired to attain a monopoly in violation of section 2, by agreeing to charge predatory prices, also beginning in October 1985."). Calling the conspiracy at issue by a more general name does not change what it is. Likewise, trying to take petitioner to task for not making arguments that did not come up until the Eleventh Circuit made its palpably erroneous departure from the *per se* rule in price fixing cases does not change what the Eleventh Circuit did.

II. THE RECORD CITATIONS RELIED ON BY TIE DOWN WERE NOT RELIED ON BY THE JURY OR THE ELEVENTH CIRCUIT

Substantial portions the brief in opposition are devoted to detailed arguments about the record that are more suited to a motion for judgment notwithstanding the verdict than an argument to this Court. This should be recognized for what it is — an attempt to make clean-cut legal problems that *are* in the court of appeals opinion appear "fact-bound" by filling the brief in opposition with extraneous material that *is not* in the opinion. The jury, however, found for U.S. Anchor, and that cannot be changed by anything Tie Down says here. It is U.S. Anchor that is entitled to every benefit of the doubt in the record — a deference to the jury that both Tie Down and the Eleventh Circuit seem at great pains to ignore. Ultimately, Tie Down's extensive citations to the record are all beside the point, because Tie Down does not and cannot show that the Eleventh Circuit's opinion relies upon any of them.[2]

---

[2] It is nonetheless noteworthy that included with the brief in opposition at App. 8 is a table that shows that for each of the years covered by the table (1986 through 1989), Rule's "Average Revenue Totals" were *less than* its "Average Variable Cost Totals" and its "Average Total Cost Totals." Moreover, Tie Down also includes a table, at App. 6, which shows that for seven of the twelve anchors covered by the MacKarvich memo, the prices specified in that memo were below the price charged to Rule by Tie Down, *with or without* the inclusion of handling and labeling charges. *Compare* Br. Opp. App. 6, second and third columns, with Pet. App. 107a, top right-hand column; *see* Pet. 20-21. Even Tie Down's own factual citations show the manifest injustice of the court of appeals' reversal of the jury's verdict.

III. TIE DOWN'S PREDATORY PRICING AND RESALE PRICE MAINTENANCE CITATIONS ARE INAPPOSITE

Contrary to its conspiracy argument, when it suits its purposes Tie Down is only too eager to emphasize the *pricing* practices that gave rise to the complaint. Thus, Tie Down makes an understandable effort to bring this case within the holdings on "recoupment" in *Brooke Group, Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. ___, 113 S.Ct. 2578 (1993), and *Matsushita Elec. Ind. Co.* v. *Zenith Radio*, 475 U.S. 574 (1986). *See* Br. Opp. 6. The same effort was made below, but the Eleventh Circuit expressly held that: "Our disposition of this case, however, makes it unnecessary to address Rule's recoupment argument." Pet. App. at 34a. Since the Eleventh Circuit did not rely on *Brooke Group* or *Matsushita*, or for that matter any other predatory pricing cases, they have little or no bearing on the petition.

Tie Down's citation to a group of resale price maintenance cases is also wide of the mark. Br. Opp. 13-15. The central issue in all those cases was whether there was sufficient evidence of an agreement. Here, the evidence of agreement was plain — as the jury plainly found. The question now before this Court is whether the Eleventh Circuit was correct in adding new intent and heightened burden of proof requirements to price fixing agreements. This additional requirement finds no support anywhere, and certainly not in resale price maintenance cases. This Court should grant certiorari to correct the Eleventh Circuit's fundamental error, or at a minimum should call for the views of the Solicitor General, who must live with the adverse effects on antitrust enforcement created by the opinion below.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

R. HEWITT PATE
HUNTON & WILLIAMS
Riverfront Plaza,
East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200

JAMES F. PONSOLDT
UNIVERSITY OF GEORGIA
SCHOOL OF LAW
Athens, Georgia 30602
(706) 542-5209

WILLIAM F. YOUNG*
HUNTON & WILLIAMS
2000 Pennsylvania Avenue, N.W.
P.O. Box 19230
Washington, D.C. 20036
(202) 955-1500

*Counsel of Record
June 2, 1994